No. 12867

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Western Air Lines Inc.,

Petitioner,

vs.

Civil Aeronautics Board,

Respondent.

BRIEF OF PETITIONER, WESTERN AIR LINES, INC.

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BRIEF OF PETITIONER, WESTERN AIR LINES, INC.

Basis of Jurisdiction.

1. Jurisdiction of Civil Aeronautics Board.

Under Sections 401, 408 and 412 of the Civil Aeronautics Act, as amended (49 U. S. C. 481, 488 and 499; 52 Stat. 987, 1001 and 1004) Western Air Lines, Inc., jointly with United Air Lines, Inc., filed an application on March 7, 1947, requesting approval of a written contract between Western and United, dated March 6, 1947, providing for the transfer by Western to United of the certificate of public convenience and necessity held by Western for Airmail Route Number 68 between Los Angeles and Denver, and for the sale by Western to United of certain properties connected with the route. The jurisdiction of the Civil Aeronautics Board is stated in the Sections cited, copies of the pertinent portions of which are set forth in the appendix.

2. Jurisdiction of This Court.

Western's petition for a review of the orders of the Civil Aeronautics Board by which Western has been aggrieved was filed under Section 1006 of the Civil Aeronautics Act (49 U. S. C. 646; 52 Stat. 1024) and Section 10 of the Administrative Procedure Act (5 U. S. C. 1009; 60 Stat. 243). Each of these statutes provides for judicial review of the agency action. Section 1006 of the Civil Aeronautics Act recites that the petition for review shall be filed in the court for the circuit where the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia. Petitioner's principal place of business is, and since its incorporation has been, in Los Angeles, California.

Statement of the Case.

The essence of this case is that under appropriate sections of the Civil Aeronautics Act the Civil Aeronautics Board without reservation of jurisdiction and unconditionally,[1] approved the transfer from Western to United of an air route certificate and certain properties used on the route in accordance with the provisions of a written contract between Western and United. Supplemental to the approving order the Board on September 11, 1947, issued an order, effective September 15, 1947, at 12:01 A. M. Pacific Coast Standard time, cancelling Western's certificate for Route Number 68 and amending United's certificate for Route Number 1 to include Western's

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[1]Except that United should charge to its surplus account a portion of the purchase price, a matter which is not at issue.

Route 68. The instant that order became effective it would have been illegal for Western to operate and illegal for United not to operate over the route. After this supplemental order became effective a petition for rehearing by the Board was filed by intervenors in the proceeding below.

Almost three years after Western's certificate for Route 68 had been "transferred" under compulsion of the Board's supplemental order effective on September 15, 1947, the Board issued a decision in the reopened proceeding purporting to approve the transfer (which long since had been consummated) on condition that Western would compensate its affected employees for monetary losses sustained in consequence of the transfer. The amount of the monetary burden imposed upon Western by this supplemental *ex post facto* order was not stated and Western was given no opportunity of electing to accept or reject the original approving order as subsequently conditioned.

In the interests of chronological clarity the events pertinent to the case will be abstracted in order of occurrence.

March 6, 1947. Western and United executed a written agreement setting forth contractual provisions for the transfer by Western to United of the certificate for Airmail Route Number 68 between Los Angeles and Denver and certain related personal property. [I, R. 9-13.]

March 7, 1947. Western and United jointly filed an application with the Board for approval of the agreement concerning the transfer of Route 68. [I, R. 3-13.]

May 20-22, 1947. The hearing on the application was held in Washington before Examiner Thomas L. Wrenn with appearances being made, among others, on behalf of the Air Line Pilots Association and the Brotherhood of Railway Clerks. Oral testimony was taken and various written documents were received in evidence. [I, R. 3-56.]

June 6, 1947. Under Section 8(a) of the Administrative Procedure Act the Board ordered the examiner to certify the entire record up to the Board for initial decision and ordered that a recommended decision of the examiner and a tentative decision of the Board be omitted. [I, R. 58-60.]

August 25, 1947. The Board issued its original opinion and order approving without condition the agreement dated March 6, 1947, between Western and United and the transfer by Western to United of its certificate for Route Number 68, with the direction that within 21 days of the date of the order United's certificate for Route Number 1 "shall be further amended to authorize United Air Lines, Inc., to engage in air transportation" between Los Angeles and Denver. [I, R. 65-188.]

September 11, 1947. By a supplemental order Number E-793 the Board decreed:

That effective September 15, 1947, at 12:01 A. M. Pacific Coast Standard time, Western's certificate for Route Number 68 be cancelled;

That United's certificate for Route Number 1 be amended to include Los Angeles-Denver, effective from September 15, 1947, at 12:01 A. M. Pacific Coast Standard time; and

That as of 12:01 A. M. Pacific Coast Standard time all authorization to render service on Route Number 68 "shall be deemed to be transferred to United Air Lines, Inc." [II, R. 894-903.]

September 24, 1947. Thirty days after the original order and nine days after Western's certificate for Route Number 68 had been cancelled by the September 11, 1947, order and barely within the time permitted by Rule 285.11 of the Board's Rules of Practice, the Air Line Pilots Association filed a petition for reconsideration of the Board's original order requesting that the Board modify its decision "so as to require United Air Lines to take into its seniority list of pilots the pilots that were normally required to fly Route Number 68 as operated by Western Air Lines." [I, R. 192-214.]

September 25, 1947. The Airline Mechanics filed a petition for leave to intervene and a separate petition for reconsideration of the Board's original order. [I, R. 214-227.]

October 3, 1947. Eighteen days after the effective date of the Board's September 11, 1947, order cancelling Western's certificate for Route 68 and amending United's certificate for Route 1 to include Los Angeles-Denver, and eight days after it had filed petitions for leave to intervene and for reconsideration, the Airline Mechanics filed a petition with the Board for a stay of its original order of August 25, 1947, which order had been consummated on September 15, 1947, when Western discontinued and United started operations between Los Angeles and Denver. [I, R. 229-230.]

October 13, 1947. The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station

Employees filed with the Board a petition for permission to file out of order requests that the Board reconsider and modify its original order. [I, R. 240-245.]

August 25, 1948. Almost one year later, by its Order Number E-1894, the Board ordered the proceedings reopened to determine (i) whether any employees of Western had been adversely affected as a consequence of the transfer of Route 68, and (ii) "what *conditions,*[2] if any, for the protection of employees of Western Air Lines, Inc., who may have been adversely affected should be attached to the Board's approval of said transfer of Route 68 and certain physical properties granted in Order Serial Number E-772, dated August 25, 1947"; and ordered that the Brotherhood of Railway and Steamship Clerks and the Airline Mechanics be made parties to the proceeding and denied the motion of Airline Mechanics for a stay order. [I, R. 245-248.]

November 14-17, 1949. More than two years after Western had discontinued operations and United had commenced operations between Los Angeles and Denver, and more than one year after the Board had reopened the proceeding, a hearing in the reopened proceeding was held before Examiner Thomas L. Wrenn who was the same examiner who heard the original proceeding. Oral testimony and written documents were received in evidence. [I, R. 250-462; II, R. 463-805.]

July 7, 1950. Almost three years after cancelling Western's certificate for Route 68 and amending United's certificate for Route 1 the Board issued its decision and

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[2]Emphasis in quoted material added throughout unless otherwise noted.

order (E-4444) declaring that the original order of August 25, 1947 (E-772), as amended, "be and it hereby is *made subject* to the following additional terms and conditions", under which Western was required to *submit to arbitration* the questions of (a) the identity of the individual Western employees who sustained monetary losses as a result of the transfer by Western to United of Route 68, and (b) the amount which each employee should be paid by Western to compensate for the monetary losses. The modifying order set up various directives with respect to arbitration, ending with a specific retention of jurisdiction, which was not included in the original order, for the purpose of modifying or clarifying any provisions of that order and for the purpose of imposing from time to time "such other or further terms and conditions as to the Board may seem just and reasonable." [II, R. 815-847.]

August 16, 1950. The Board issued its order granting Western until September 21, 1950, within which to file a petition for rehearing of the Board's order dated July 7, 1950, and denying Western's request for a stay order. [II, R. 850-851.]

September 21, 1950. The Brotherhood of Railway and Steamship Clerks filed a petition for rehearing of the Board's order dated July 7, 1950. [II, R. 854-859.]

September 22, 1950. Western filed a petition for rehearing of the Board's order dated July 7, 1950. [II, R. 860-1.]

December 29, 1950. More than three years and three months after Western had discontinued and United had commenced operations between Los Angeles and Denver the Board, by its Order Number E-4987, amended its

order dated July 7, 1950, by clarifying in some respects the general procedure set up for arbitration and by denying Western's petition for reconsideration. This brought to an end Western's efforts to obtain relief from the Board. [II, R. 861-872.]

February 23, 1951. Western filed with this court its petition for a review of the Board's Order Number E-4444 dated July 7, 1950, and its Order Number E-4987 dated December 29, 1950 "to the extent and so far as the orders amend or make subject to additional terms and conditions an order of the Board dated August 25, 1947, Serial Number E-772." [II, R. 875-880.]

Questions Involved.

1. Did the Board have the legal right to impose onerous conditions on its approval of the transfer of the certificate for Route 68 and related personal property approximately three years after the transfer had been consummated and under circumstances and at a time when Western had no choice of accepting or rejecting the approval as retroactively conditioned?

2. Did the Board have the right to compel Western to arbitrate a matter requiring judicial judgment?

3. Did the Board's procedural steps comply with the Administrative Procedure Act requiring a speedy determination of the rights of the parties involved?

4. Did the Board have the right to impose employee protective conditions on Western alone?

5. Did the Board have the right under the Civil Aeronautics Act, or otherwise, to impose employee protective

provisions as a condition to approval of the transfer of Route 68, with or without an opportunity to accept or reject the approval as conditioned.

Specification of Errors.

The errors which Western relies upon and which will be urged in support of its position on this review are that the Civil Aeronautics Board below erred:

1. In imposing *ex post facto* conditions to the approval of the transfer to United of Western's certificate for Route 68 almost three years after Western's right to operate under the certificate had been cancelled by an order of the Board, which delayed conditional approval did not allow Western the privilege of accepting or rejecting the approval as conditioned.

2. In ordering Western to submit to arbitration matters requiring the judicial judgment of the Board and in failing to provide a method of appealing the decision of the arbitrators to a higher tribunal.

3. In failing to accord Western a speedy determination of its rights and duties as required by the Administrative Procedure Act.

4. In imposing the *ex post facto* labor protective conditions on Western without requiring United, the other party to the contract, to share in the onerous conditions.

5. In imposing without statutory authority labor protective provisions as a condition to the approval of the transfer to United of Western's certificate for Route 68.

Summary of Argument.

1. Ex Post Facto Conditions to an Approval Are Illegal.

The Board had no statutory right to impose, and no legal justification for imposing, onerous conditions to its approval of the transfer to United of Western's certificate for Route 68 after the transfer had been consummated under compulsion of an order of the Board.

2. The Board Had No Legal Right to Force Western to Submit a Judicial Matter to Arbitration.

The Board had no statutory right to order, and no legal justification for ordering, Western to submit to arbitration which of its employees were adversely affected by the transfer to United of Western's certificate for Route 68 and the amount of money which Western would have to pay to each of its affected employees as compensation for the damage sustained. The illegality and unjustifiability of that provision is emphasized by the fact that Western would be denied any right of appeal from a determination of the arbitrators.

3. Western Was Denied a Speedy Determination of Its Rights and Duties as Required by the Administrative Procedure Act.

The Administrative Procedure Act provides that an administrative agency shall proceed with reasonable dispatch to conclude matters presented to it. Even though it were legally permissible for the Board to impose *ex post facto* condition to its approval of a transfer, the imposition of

the onerous conditions almost three years after the transfer had been consummated amounted to an unreasonable delay in concluding the matter before the Board under a petition for reconsideration.

4. The Board Abused Legal Principles in Imposing Conditions on Western Alone.

Assuming that the Board had a legal right to impose labor protective conditions on its approval *ab initio* and also assuming that those conditions could be imposed *ex post facto,* it was an abuse of judicial right and judicial discretion to impose the conditions on Western alone when United was a party to the contract and derived equal, if not greater, benefits from it.

5. The Board Had No Statutory or Judicial Authority to Impose Labor Protective Conditions.

The cases permitting, and the statutes requiring, labor protective conditions with respect to transactions involving railroads are not applicable to airlines. There is no applicable statute authorizing the Board to impose *ab initio,* let alone *ex post facto,* labor protective conditions to its approval of the transfer of a certificate for an air route, and the circumstances cloaking the growing air transportation industry do not justify resorting to administrative legislation.

ARGUMENT.

I.

Ex Post Facto Conditions to an Approval Are Illegal.

(a) Statutory and Factual Background.

Western adheres to the position, which will be argued briefly under point 5, that the Board has no statutory power and no judicial authorization to apply labor protective conditions, prospective or retroactive, to its approval of transactions which fall within the purview of Sections 401 or 408 of the Civil Aeronautics Act. But since the imposition of *ex post facto* conditions is so flagrantly illegal primary reliance for a reversal will be based on that point.

Section 401(i) of the Civil Aeronautics Act reads:

> "No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest."

Nothing is said about the imposition of any type of a condition. So long as the proposed transfer is consistent with the public interest it is the duty of the Board to approve it.

Assuming for the moment that the Board could say that absent a certain condition the transfer would not be consistent with the public interest and that accordingly the transfer will be approved only in the event a specified condition is fulfilled, it is perfectly manifest that that condition would have to be stated, and therefore prospective. It would not be legal under this section of the Act for the Board to approve a transfer as being consistent with the public interest and then some three years later, during

which time the public interest had been subserved by the transferee, to hold that the transfer would not be consistent with the public interest unless certain conditions were fulfilled.

Section 408(a)(2) of the Civil Aeronautics Act, which is printed in the appendix, provides that it shall be unlawful, unless approved by order of the Board, for any air carrier to purchase all or any substantial part of the properties of another air carrier.

Section 408(b) sets up the mechanism for obtaining the Board's approval and declares that unless after a hearing the Board finds that the purchase will not be consistent with the public interest it shall approve the purchase "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe."

Since Western's application to the Board was made under Section 408 as well as Sections 401 and 412 [I, R. 3] no question will be raised here as to the applicability of Section 408, although it could well be argued that Western's Route 68 and the related personal property did not constitute a substantial part of its property within the purview of that section. But whether or not applicable there can be no doubt that the terms and conditions which the Board might find to be just and reasonable must accompany the approval. The statute does not provide a legal means whereby the Board at a later date, even a week let alone three years, may change its mind and attach *ex post facto* conditions to a previously granted and consummated unconditional approval.

Although Western's application recited that it was presented under Section 412 it is so obvious that this section

was not, and is not, applicable to the transaction at issue that space will not be wasted in analyzing it. It may be noted in passing, however, that were Section 412 applicable, the points urged with respect to Sections 401 and 408 would fit equally well.

The transfer of an air route certificate from one air carrier to another is entirely *voluntary,* subject only to Board approval under Sections 401 and 408. There is no provision in the Civil Aeronautics Act, or any other act, whereby the Board may *compel* one air carrier to transfer a route certificate to another air carrier.

Thus before a route certificate may be transferred from one carrier to another[3] the two carriers must negotiate to a meeting of the minds, followed by a contract setting forth precisely the terms and conditions under which the one, voluntarily, is willing to sell and the other, voluntarily, is willing to buy. This is what Western and United did. The contract is then submitted to the Board for its approval under Section 401(i) and, if applicable, under Section 408(b). If, after a hearing the Board find that the transfer would be in the public interest, or at least not contrary to the public interest, it becomes the duty of the Board to approve it. But that is all the Board is able to do—approve or disapprove. If the Board disapprove, the parties to the voluntary contract remain in *status quo* with no liability one to another. If the Board approve, the parties to the voluntary contract are at legal liberty to consummate it, should they choose to do so. If, during the in-

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[3]The only possible legal exception to this statement would be if a carrier had its certificate revoked under Section 401(h) after a hearing for an intentional failure to comply with the act, followed by a reissuance of the certificate to some other carrier under Section 401(d).

terim between execution of the contract and its approval by the Board, the parties, by mutual concurrence, should experience a change of mind and should decide not to consummate the contract, they would be at liberty so to do. Or, if, after execution of the contract and after its approval, one party, for valid grounds, should choose to rescind it that party would be at liberty so to do.

The Board's approval is not mandatory, it is only permissive.

The Board does not have the power, statutory or otherwise, to rewrite the contract between the parties. The Board does not have the power, statutory or otherwise, to compel either party to give or take more than is provided for in the contract.

The only power the Board has—and this is deserving of emphasis—is the power to withhold its approval in the event either party should be unwilling to yield to appropriate conditions which the Board might find would be necessary to make the contract unobjectionable to the public interest. There is no legal weapon under which the Board may compel either party to a contract having as its *res* the transfer of an air certificate to abide by conditions which the Board may choose to impose and which the Board has a right to impose under the applicable section of the Civil Aeronautics Act. If either party do not choose to accept the approval as conditioned, the contract falls and the *status quo* is preserved.

This well seasoned principle seems to be recognized by the Board since this statement is found in its original opinion dated August 25, 1947:

> "One of the gravest mistakes this Board could make would be to assume that the end justifies the

> means and that the Board could properly do indirectly by the exertion of such compulsion what it was not permitted by law to do directly. *We know of no direct or indirect means available under the existing law by which an air carrier can be forced against its will to transfer its property, business and certificate to another air carrier.* If such transfers are to be accomplished under the existing law it would seem that the inducement of reasonable market prices, except in rare instances, would be found necessary even though such prices contained sufficient commercial profits to the seller to generate a business incentive to sell. No declaration by this Board against the validity of fair commercial prices that contain an element of profit will be able to repeal the economic laws and business motives that influence exchange prices and impel business activity in a free economy." [I, R. 125-6.]

But the unconscionable method of imposing retroactive *ex post facto* conditions in this case suggests that the Board is not always too quick to practice that which it proclaims with such dignity.

The Board's proclamation, which it has not chosen to follow, and the principal point on which Western is relying, that the parties must be accorded the right of accepting or rejecting a conditional approval is fully supported by law beyond and in addition to the clear wording of the applicable sections of the Civil Aeronautics Act.

Section 1008(a) of the Administrative Procedure Act (5 U. S. C. A. 1008, 60 Stat. 242) provides:

> "In the exercise of any power or authority—(a) No sanction shall be imposed or substantive rule or

order be issued except within jurisdiction delegated to the agency and as authorized by law."

The word sanction is defined in Section 1001(f) of the Administrative Procedure Act in this language:

> "'Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action."

When the Board imposed onerous conditions upon Western under circumstances which effectively and completely denied to Western a choice of accepting or rejecting them, those conditions became sanctions which are prohibited by the quoted section of the Administrative Procedure Act.

The Board recognized with commendable clarity the very point Western is here urging when this declaration was made in the July 7, 1950 decision on the reopened procedure, in these words:

> *"Hence, the imposition of conditions does no more than give the parties to a certificate transfer an opportunity to modify the basis of their transaction and thereby to avoid the order of disapproval which the Board would otherwise be compelled to issue."* [II, R. 830.]

But the Board in its next breath flaunted its own admonition.

No more than a couple of questions is needed to kindle the assertion that Western was not accorded the right of accepting or rejecting the conditional approval. With the transaction having been completed, not simply with the Board's blessing but under the Board's compulsory directive, almost three years before the retroactive conditions were made known, how would it be possible from any practical standpoint to undo that which had been done and which had remained done for some three years? If United sustained a loss in its operation of the route during those three years, would Western have to make good that loss, or if United made a profit would United have to disgorge it to Western? In what condition would United have to return the equipment that went with the transaction—in its original condition or with reasonable wear and tear accepted? With the contract between Western and United fully consummated, how could Western enforce a "rescission", if that be the correct term, against United if United demurred to the proposal, as United quite obviously would?

The simple fact is that there is no possible method of sensible tint which could be appropriated to undo now that which has been done with Board sanction—in fact direction. Thus, unless this Court reverses the Board to the extent required to eliminate the *ex post facto* conditions, Western will have to accept them. And it would not matter whether those conditions should prove to be completely innocuous or burdensome to the point of bankruptcy.

The Board is fully aware of Western's untenable position. In its last order of December 29, 1950 denying Western's petition for a reconsideration of the reopened

order which is the subject of challenge, the Board made this barbed threat:

> "Western argues that there is no way in which the Board can enforce its order of July 7 and compel Western to comply with the conditions. But it seems to us that we have the same power in this case as in any other. Failure by Western to comply with the conditions of the July 7 order would render inoperative the approval heretofore granted under sections 401(i) and 408(b) of the transfer to United of Route 68 and related physical properties. *By refusing to comply with the conditions, Western would, unless it could undo the transaction with United, be placing itself in violation of sections 401(i) and 408(b) and would be subject to all the penal and enforcement provisions of the Act applicable to such violation.* The fact that Western might find it impractical to undo the transaction would not be a defense because the failure to impose conditions in the original order of approval was due to the Board's reliance on testimony by Western's president and because by consummating the transaction prior to the expiration of the time fixed for reconsideration, Western went ahead at its own risk." [II, R. 863-4.]

The Board's reference to its reliance on the testimony of Western's president will be discussed later. The limp excuse that Western went ahead at its own risk because it consummated the transaction prior to the expiration of the time fixed for reconsideration is dissolved by the fact that Western did not go forward at its own risk or its own volition but under the uncompromising mandate of the Board's order of September 11, 1950 (E-793) which cancelled Western's certificate for Route 68 at

12:01 A. M. on September 15, 1950, and at the same moment amended United's certificate for Route 1 to include Route 68. The thirty day period for filing a petition for reconsideration did not expire until September 24, 1950, some nine days after Western, by the Board's order, has been compelled to go ahead. But this did not entail any voluntary assumption of risk.

It might be well to pause here to note that under Section 285.11 of the Board's Rules of Practice a petition for rehearing must be filed within thirty days after service of the order sought to be vacated or modified. However, such a petition may be filed after the expiration of the thirty days by leave of the Board granted pursuant to formal application. There is no time limit specified in the rule after which the Board may not grant the right to file a petition for rehearing. Therefore, if the Board's frightening pronouncement were sound no party to a route transfer proceeding would ever dare go ahead under a Board order.

(b) Western's Position Is Supported by Case Law.

Support for the position urged by Western is found in reported decisions.

> "Upon defendant's compliance on October 1, 1890, with our decision of a month previous, this case had, so far as appeared in the record, been heard, decided and closed. We are not willing to consider this case reopened in this supplementary proceeding, which only concerns reparation, and rule upon questions in the original case which were not disposed of by our decision of September 5, 1890. As to reparations now demanded for damages claimed to have resulted from practices found unlawful by said

decision, *we think it would be unwise, as a matter of practice, and also unjust to the defendant, to amend the final Order entered herein nearly four years ago, and promptly obeyed by that company,* so as to subject the carrier to further requirements in favor of these complainants in respect of violations which were corrected under said order." (P. 457.)

Rice, Robinson & Witherop v. Western N. Y. & P. R. Co., 6 I. C. C. 455.

"The Commission is an administrative body. The rates, regulations and practices which it establishes within its jurisdiction become rules of action which may and must enter into the business dealings of this country. It may be necessary to change from time to time these rulings as varying conditions require, but they should never be changed except upon due notice to the public, which is affected by them, and *it would be altogether intolerable if the change could be made retroactively.* (Pp. 93, 94.)

* * * * * *

"This Commission cannot, without stultifying itself, make any ruling which will condemn as unlawful the payment of these elevator allowances during the time they have been expressly sanctioned by its decisions." (P. 94.)

Nebraska-Iowa Grain Co. v. U. P. R. R. Co., 15 I. C. C. 90.

"The law is well settled that *quasi* judicial bodies, like courts, may, on their own motion or by request, correct or amend any order still under their control without notice or hearing to the interested parties, *provided such parties cannot suffer by reason of the*

correction or amendment, or if the matters corrected or amended were embraced in testimoney taken at a previous hearing." (P. 888.)

In re Joe Brown & Sons, 263 N. W. 887 (1935), 273 Mich. 652.

"As to the transportation which occurred subsequent to September 7, 1933, the relief sought cannot be granted, because *there can be no retroactive repeal of orders prescribing maximum reasonable rates for the future."* (P. 754.)

Otis Gin and Warehouse Co. v. Atchison, Topeka and Santa Fe Ry. Co., 219 I. C. C. 749.

"The enjoyment of the benefit of the order as made was an acceptance of the condition with which the Court saw fit to burden it. *The two should have been accepted or rejected as an entirety, and this course does not seem to have been followed."* (P. 170.)

Ford v. Simmons, 121 Pac. 167 (Colo.), 52 Colo. 242.

Even criminals, when offered a conditional pardon, are accorded the privilege of accepting or rejecting the pardon as conditioned.

"A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected, we have discovered no power in a court to force it on him . . . A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment." (P. 150.)

U. S. v. Wilson, 7 Peters 150, 8 L. Ed. 640.

"It is universally agreed that the pardon board may extend its mercy on such terms as it sees fit, and consequently may annex to the pardon any condition either precedent or subsequent, or both, on the performance of which validity of the pardon will depend, provided such conditions are neither immoral, impossible, nor illegal. *The prisoner may accept or reject it at his will;* but, once having accepted it, he becomes bound by all attaching conditions." (P. 757.)

Guy v. Utecht, 12 N. W. 2d 753, 216 Minn. 255.

"It has long been held that consent by the prisoner is a prerequisite to the validity of a conditional pardon because its terms may be more objectionable than the punishment fixed by the sentence. (U. S. v. Wilson, 7 Pet. 150 [8 L. ed. 640], and see cases cited in Annotation 52 A. L. R. 835.) The same conclusion having been reached in California many years ago, this Court held that to be effectual, a conditional pardon must be accepted by the prisoner." (P. 82.)

In re Peterson, 14 Cal. 2d 82, 92 P. 2d 890.

"That an applicant for probation has the right to decline the offer when he deems the terms in excess of the Court's jurisdiction, or too onerous is settled beyond any controversy." (P. 717.)

Lee v. Superior Court, 89 Cal. App. 2d 716, 201 P. 2d 882.

The invalidity of *ex post facto* conditions under the circumstances involved in the case at issue is even more pronounced than would be the attempted imposition of *ex post facto* condition to a pardon three years after

the convict had been released, and at a time when he had rehabilitated himself in society—cruel and invalid as such an act would be. The ex-criminal, nonetheless, at least would have the option of rejecting the conditions and resuming his penal servitude. Here Western, unless relieved by this Court, must abide by the retroactive conditions.

Although the Board's own interpretation of its own power may not be controlling, a good deal of significance must be attached to the Board's doubt of its own power to tamper with an issued certificate upon timely reconsideration of the original order. This statement of the Board appears in the supplemental opinion on reconsideration in the *Kansas City-Memphis-Florida* case, reported in 9 C. A. B. 401, commencing on page 408:

> "In view of our present decision affirming our former judgment, *it will be unnecessary to discuss the question vigorously presented by counsel for Chicago and Southern concerning the statutory power of the Board to revoke upon reconsideration a certificate of public convenience and necessity which was issued and made effective at the time of the original decision. We have grave doubt, however, as to our possession of such power,* and in future cases of this kind, except where national security or other urgent considerations dictate otherwise, we shall pursue a policy of making the certificate effective on such date as will permit reconsideration without creating the legal problem raised in the present case."

In recognition of this grave doubt it is the Board's current policy to make an order amending an old or granting a new certificate of public convenience and necessity effective after the last day on which a petition for reconsideration may be filed.

(c) The Board's Original Order Did Not Reserve Jurisdiction.

In its modifying order of July 7, 1950 (E-4444), which is the order under main fire, the Board purported to retain jurisdiction with this language:

> "The Board hereby retains jurisdiction of this proceeding for the purpose of modifying or clarifying any provisions of this order and for the purpose of imposing from time to time such other or further terms and conditions as to the Board may seem just and reasonable." [II, R. 847.]

It is not necessary to tussle with the validity of such a reservation since neither the order of August 25, 1947 nor the supplemental order of September 11, 1950, under which Western was compelled to, and did, act, contained a reservation of jurisdiction. But at least had the reservation which appears in the July 7, 1950 order been included in the August 25, 1947 order or the September 11, 1950 order, Western would have been given some warning of the possible pendency of doom. Under those circumstances there might have been some faint justification for a claim that Western went ahead at its own risk, had not Western halted long enough to ask for a clarification. Moreover, the fact that the Board inserted the reservation in the July 7, 1950 order must be interpreted as a confession of the weakness of its position for

not having given a similar warning in the order under which Western was forced to act.

This is the way the Interstate Commerce Commission has handled the matter of reserved jurisdiction:

> "Upon consideration of the evidence and circumstances in this case we are of the opinion that we should reserve jurisdiction, for a period of three years from date of consummation herein, to make such additional findings and impose such terms and conditions with respect to the employees of the carriers considered in the merger, as may be necessary, and lawful, if, upon petition by them, or their representatives, within that period it is shown that the condition of their employment or interests incident thereto have been, or will be, adversely affected by anything done or proposed to be done, pursuant to, or as a direct result of consummation of the merger under the authority herein granted. *Consummation of the transaction by Greyhound will be considered acceptance of such reservation of jurisdiction.*"
>
> *The Greyhound Corporation — Control — Southeastern Greyhound Lines, et al. v. M. C. F.—4307, Oct. 3, 1950.*

(d) Western Is Not Estopped to Object to the Ex Post Facto Conditions.

In its decision and order of July 7, 1950, which first imposed the conditions, the Board recognized the vulnerability of its position and evidently endeavored to set up an anticipatory defense with this language:

> "The situation is not altered in this case by reason of the fact that we have already approved the transfer of Route 68 and related physical properties by Western to United without conditions for the benefit

> of adversely affected employees and that the transfer thus approved has been consummated. As our opinion makes clear, in declining to impose conditions for the benefit of Western's employees in our original order of approval, we relied on the representations of Western's president that its employees would not be adversely affected by the transfer. United-Western, Acquisition of Air Carrier property, 8 C. A. B. 298, 311. *Regardless of whether we could modify our order to impose such conditions in the absence of those representations, we think it clear that Western by reason of them is estopped to challenge any such modification in this proceeding."* [II, R. 831.]

Resorting to such a plea does little credit to the dignity and judicial timbre of a high and important administrative agency.

This is what Mr. Drinkwater, who became president of Western on January 1, 1947, said during the original hearing on May 20, 1947:

> "Q. When you say there that you intend to absorb substantially all of the personnel, I just wondered why the qualification? A. Of substantially?
>
> Q. Yes. A. Because we have too many people in most places in Western Airlines, and we are trying to reduce our overhead, and reduce the number of employees wherever we can. *I did not want to say that we would absorb them all because as we get further into the situation, we may find we have too many folks, but generally speaking we know we will need at least 14 flight crews to fly between San Francisco and Seattle, to say nothing of Mexico City.* We know we will need station personnel at Seattle, in number and experience and classification

which will certainly be analogous to our present personnel in Denver.

Q. You estimate what percentage of your personnel will probably be taken over? A. Percentage of what personnel?

Q. The personnel on Route 68 now. A. You mean Denver, Grand Junction and the pilots?

Q. Yes. A. All of the flight crews, 100 per cent of the flight crews, and I suppose, well, everybody in Grand Junction who wants a job, and everybody in Denver who wants a job that is a competent person, is going to get a job. We have to leave some people in Denver to operate Inland Airlines, of course. But aside from the general reduction in personnel which is still going on in Western Airlines, we would take care of all of these people.

Q. Would this reduction in the personnel on Route 68 be made regardless of whether the sale were approved? A. Yes. It is the same program that is going on on routes 13, 19, 63, 52 and 6.

Q. Then actually you intend to absorb all of the personnel that you would have kept anyway? A. Subject to that qualification, yes." [I, R. 41-2.]

In the original decision of August 25, 1947 the Board had this to say on the subject:

"The intervener, Air Line Pilots Association, urges that the Board require as a condition of approval of the sale of route No. 68 that the pilots on the Denver-Los Angeles division should be taken over by United and given full employment and senior-

ity rights without prejudices. It is not clear from the testimony that the local organizations of Western and United pilots subscribe to this policy. *Western's president testified that Western had every intention of retaining the 14 flight crews operating on route No. 68 in the event this transaction is approved and transferring them subject to their seniority.* This witness testified that Western would need more than the 14 crews available from the sale of route No. 68 in order to operate the Seattle extension and the Mexico City route. The witness also testified that no employee of Western will be released because of this transaction and that every competent employee in the employment of the company at Grand Junction and Denver will continue with Western, that the company will probably need more employees at Portland and Seattle than it presently employs at Denver and Grand Junction, and that Western will pay the employees' moving expenses. The evidence shows that the question of transfer of pilot personnel was not discussed in the negotiation preceding this transaction, nor was it a condition of the sale. It is clear from the record that Western's pilots will continue to be employed by Western, retaining their seniority and other rights, and that every other competent employee on route No. 68, who would be retained by the company if this transaction had not been proposed, will continue to be employed by the company with full rights. *Therefore, since there is nothing that would indicate that any of the rights of Western's present employees on route. No. 68 will be prejudiced*

> *by the acquisition and operation of that route by United, there appears to be no reason for any condition of the nature urged by the Air Line Pilots Association."* [I, R. 97-8.]

Although Mr. Drinkwater used the words *"substantially* all of the personnel" and although the Board knew that when he was testifying he had only the benefit of human foresight, rather than hindsight, and although in its original opinion the Board only quoted Mr. Drinkwater as having said that Western had *"every intention* of retaining the 14 crews operating on Route 68", the Board in its July 7, 1950 decision claims that it relied on the *representations* of Western's president that its employees would not be adversely affected by the transfer.

The record in the reopened proceeding would support, if, in fact, it did not compel, a finding that the employees of Western were not adversely affected by the transfer of the route, but since the force of the other points urged by Western make it unnecessary to impose upon this Court the burden of weighing the evidence[4] that point will not be urged in this opening brief.

In all events the Board's belated contention that it was misled by the "representations" of Western's president

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[4]Under the Administrative Procedure Act courts reviewing an order of an administrative agency have much greater latitude in scrutinizing the evidence than is the case in an appeal from a lower court. *Universal Camera Corp. v. NLRB,* 95 L. Ed. Advance Opinions 304.

and that Western is now estopped to complain of legal error is at best a transparent and unvaliant shield behind which the Board seeks to defend its change of mind.

A startling innovation in our precepts of law would result if the good faith predictions of a witness, though later they proved to be inaccurate, could be used by a judicial body to sustain a decree that otherwise would be unlawful. Estoppel, even though the elements existed, cannot be used as a prop to uphold an invalid judgment of a judicial or *quasi* judicial body.

To establish estoppel, in situations where estoppel may be a defense, a false representation must be made with knowledge, actual or constructive, of the real facts, and the party to whom it was made must have been without knowledge or the means of knowledge of the real facts.[5]

If the doctrine of estoppel could be brought into play for the purpose of upholding or defeating a judicial or *quasi* judicial decree the Board would be estopped, not Western. The Board led, or, more properly, pushed, Western into consummating its written contract with United without the slightest warning that some three years later onerous conditions might be imposed, with no opportunity given to accept or reject the approval as conditioned. Here are all of the essential elements that give rise to the doctrine of estoppel.

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[5]*Current News Features, Inc. v. Pulitzer Publishing Co.*, 81 F. 2d 288; *Grouf v. State National Bank of St. Louis*, 40 F. 2d 2; *Gruber et al. v. Savannah River Lumber Co.*, 2 F. 2d 418.

II.

The Board Had No Legal Right to Force Western to Accept Arbitration.

The order of July 7, 1950 decrees that Western shall (not may) submit to arbitration the question of the identity of the Western employees who sustained monetary losses as a result of the transfer of Route 68, and the amounts which each employee should be paid as compensation. The order includes this directive:

> "9. Western shall, within such time as the arbitration tribunal shall fix, *comply with the provisions of the arbitration award.*" [II, R. 847.]

There is no provision in the order for appealing to the Board for relief against an unconscionable arbitration award. And once the time to appeal from the Board's order had expired there would be no right to seek court relief if the arbitrators were to hand down an award unsupported by the evidence.

Assuming, to which Western will not accede, that the Board has the power to attach either prospective or retroactive conditions to its approval, under Section 401(i), of the transfer of the certificate or its approval, under Section 408(b), of the agreement, the conditions must be fixed by the Board, not by someone delegated by the Board. At the very least, Western has the right to a finding by the expert and judicious members of the Board that the conditions imposed are just and reasonable. Western reposes confidence in the individual members of the Board and in the Board itself, notwithstanding the commission of occasional errors. Western would have no occasion to have confidence in three arbitrators, only one of whom would be designated by Western, one

of whom would be known to be prejudiced against Western, and none of whom would be under oath of office or who would hold tenure of position exerting a force of good faith administration.

It is no answer to say that the order and the later supplements attempt to define limitations within which the three arbitrators may act. The fact remains that if the order be allowed to stand the three arbitrators will have the plenary, final and unappealable power to name which of Western's employees were harmed by the transfer and how much Western must pay each.

Under Section 408 the Board's right to impose any type of condition upon its approval is limited to conditions which the Board shall find to be just and reasonable. A finding that the affected employees and the amount of damage should be determined by arbitration is not a finding that the determination of the arbitrators is, or will be, just and reasonable. Since the Board set up no procedure for accepting, rejecting or modifying the award of the arbitrators it would not be possible for the Board to make a finding on this point which would be responsive to the law.

It is not contended that court commissioners or agency examiners do not play a proper and legal function in judicial and *quasi* judicial procedures. But an unbridged gap exists between the recommendations of a commissioner or examiner which may be accepted, rejected or modified by the court or the Board, and an award of three arbitrators which cannot be touched by the agency ordering the arbitration and which cannot be subjected to judicial test by a review of a court of law.

III.

Western Was Denied a Speedy Determination of Its Rights and Duties as Required by the Administrative Procedure Act.

On March 7, 1947 Western and United jointly filed an application with the Board for approval of the agreement relating to the transfer of Route 68. Between the 20th and 22nd of May, 1947, only two and one-half months later, the hearing was held before an examiner in Washington. On August 25, 1947 the Board issued its original opinion and order approving the transaction without any labor protective conditions. The transaction was fully consummated on September 15, 1947 under the Board's mandatory supplemental order of September 11, 1947. These procedural steps reveal what can be done in concluding a matter with reasonable dispatch.

A rather shocking contrast exists between the original proceedings and the reopened proceedings.

On September 24, 1947 the Air Line Pilots Association filed a petition for reconsideration of the original order. This was followed on September 25, 1947 by a similar petition on behalf of the Air Line Mechanics, and on October 13, 1947 by a like petition on behalf of the Brotherhood of Railway and Steamship Clerks. On August 25, 1948, *almost a year later,* the petitions for reconsideration were granted. Between the 14th and 17th of November, 1949, *now more than two years after the original order,* the hearing on the reopened proceedings was held in Washington. On July 7, 1950, *only two months short of three years after the original order,* the

Board came out with the reopened order imposing upon Western alone *ex post facto* labor protective conditions. On December 29, 1950 Western's petition to reconsider the order on the reopened proceedings was denied and the matter came to final rest on the Board's docket.

Section 1005(a) of the Administrative Procedure Act (5 U. S. C. 1005), which became effective in September, 1946, provides in part that "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives."

The Supreme Court of the United States said this about the Administrative Procedure Act in *United States v. Morgan Salt Co.*, 94 L. Ed. 402, 338 U. S. 632 at page 411 of L. Ed.:

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards, even narrower than the constitutional ones, against arbitrary official encroachment on private rights."

If the Administrative Procedure Act is to be given meaning, the Board's order in the reopened proceedings which is being challenged on this review should be reversed on the single ground that the Board brought the reopened proceeding to a conclusion only after an utterly

unreasonable and inexcusable delay. Regardless of the Board's right to impose *ex post facto* conditions after requiring consummation of the unconditionally approved agreement by the order of September 11, 1947, it would be a signal injustice to say that the Board responded to the provisions of the Administrative Procedure Act, and particularly the quoted provision of Section 1005(a), when it held over Western's head for almost three years the threat of adding burdensome conditions to a previous unconditional and fully implemented approval.

IV.

The Board Abused Legal Principles in Imposing Conditions on Western Alone.

The labor protective conditions belatedly added by the Board are imposed on Western alone. This was done notwithstanding the fact that the Air Line Pilots Association throughout the proceeding adhered to the position that the pilots should go with the route. [I, R. 323-4.] The Board sidestepped the wishes of the pilots with this language:

> "ALPA has recommended that we require United to integrate into its seniority list six Western pilots to be designated pursuant to a formula arrived at by arbitration between Western pilots and United pilots. However, Public Counsel suggest that there is some doubt of our legal power to order United to absorb these employees in light of the peculiar facts of this case.

> "It is not necessary for us to decide this question of our legal power. *Under the circumstances present herein, we do not deem it appropriate or practical to apply such condition to United retroactively.*" [II, R. 833.]

Later it will be argued briefly that the Board has no authority, prospectively or retroactively, to impose labor protective conditions against either the transferor or transferee when approving a route transfer. But assuming for the moment that the Board does have that power and assuming that exercising it in *ex post facto* fashion violence would not be done to equity or law, the theory under which labor protective conditions are permitted in railroad cases will not countenance the imposition of the conditions on Western alone.

The Supreme Court of the United States in *United States v. Lowden,* 84 L. Ed. 208, 308 U. S. 225, which is the fountainhead for labor protective conditions in the railroad industry, noted that the security holders would benefit by the economies stemming from the lease and that the resulting savings would be used only in part to compensate the affected employees.

Here United acquired additional operating rights and additional operating equipment involving an expansion of its over-all operations, and presumptively involving an enlargement of its personnel needs. In addition United bettered its income and profit potential. To the contrary Western cut back its operating rights and reduced its operating equipment, although both the cut-back and

reduction in effect were neutralized by an almost concurrent expansion of its operating privileges by an award from the Board extending Western's operations from San Francisco up to Seattle. Western's income and profit potential likewise was reduced by the transfer, though this, too, was largely offset by the new award to Seattle.

Under the circumstances framing this particular case United was the principal beneficiary. If either party were to be called upon to share its benefits with labor that party should have been United, not Western. In any event United should have been included as a participant in the plan.

The foundation of labor protective conditions in the railroad industry is social in effect and intent. The essence seems to be that those who benefit by the transaction should be called upon to share their benefits with those who will be burdened in consequence of the transaction. If a similar precept is to be translated into the relatively new and entirely different air transportation industry by case law, those who reap the benefits should be made to bear the burdens proportionately.

In urging this point Western is not to be understood as advocating the philosophy of the Air Line Pilots Association that the pilot should go with the route. Western would resist with great vigor the adoption of that theory, whether imposed on Western or one of its fellow members of the industry.

V.

The Board Has No Statutory or Judicial Authority to Impose Labor Protective Conditions.

Since the Board's order of July 7, 1950 must be reversed on the grounds which have been urged up to this point, the illegality of any labor protective conditions in the air transportation industry will not be stressed or argued in detail. To analyze this point to the extent that would be proper, were it the principal point on which Western had to rely, very many pages in this brief would be used. The point is being noted in brief fashion largely to place on record Western's position and to add collateral substances to the other points which have been urged.

As a preface it may not be trespassing too far off the record to note that Western was involved in its first organized labor strike during its twenty-five years of existence only after the turn of the last half of the current year. Western is proud of the happy labor relations it has enjoyed and dedicates itself to maintaining those relations to the continuing betterment of the well-being of its employees, consistent with the rights of the air traveling public and the rights of the beneficial owners of the company who have made possible the payment of salaries and wages.

Western does not question the right of the Interstate Commerce Commission to impose labor protective conditions in certain transactions pertaining to the railroad industry. This right was first established by the United States Supreme Court in the *Lowden* case, which has been cited. That case has been bolstered by *Interstate*

Commerce Commission v. Railway Labor Executives' Association, 315 U. S. 373, 86 L. Ed. 904 (1942), and in *Railway Labor Executives' Association v. United States,* 339 U. S. 142 (1950).

In addition to the case law the protective conditions in the railroad industry are mandatory in certain matters under Section 5(2)(f) of the Transportation Act of 1940 (49 U. S. C. 5). A similar provision with respect to telegraph carriers is found in Section 222(f) of the Communications Act (47 U. S. C. A. 222).

But the opinion in the *Lowden* case is replete with language making it clear that the principle established by that decision was meant to apply to railroads alone. The reasoning that led to the conclusion reached by the Court was based on the unusual and unique economic conditions then prevailing in the railroad industry. That industry then had reached its zenith of development. It was enthralled in economic disturbances. Much agitation was in flow, and official investigations in process, to determine a program of merging and consolidating to eliminate areas of dry rot. Known to the Supreme Court, which no doubt had a measure of influence, Congress was in the process of enacting legislation which ultimately became Section 5(2)(f) of the Transportation Act. It must have been realized by the Supreme Court that volcanic consequences might have afflicted the railroad industry if some labor protective conditions were not permitted in connection with the expected and hoped for onrush of mergers and consolidations.

As a clear warning that the *Lowden* decision was intended to be confined to the railroad industry and its unique involvements and was not intended to permit the enforcement of labor protective conditions in other industries the Court was careful to make this statement:

> "Moreover we cannot say that *this limited and special application of the principle,* fully recognized in our cases sustaining workmen's compensation acts, that a business may be required to carry the burden of employee wastage incident to its operation, infringes due process." (P. 219 L. Ed.)

The airline industry is still young, compared to the status of the railroads when the *Lowden* case recognized the law that was then in the Congressional mill. The airlines are still growing in route expansion as well as technical advancements. There are no large areas of dry rot in the airline industry as there were in the railroad industry such as to call for judicial as well as legislative action. Some mergers and some route adjustments in the airline industry might be helpful, but there is no need for wholesale adjustments. There is no projected program in the airline industry which might cause major displacements of airline personnel, in turn resulting in an uneasy jolt to the national economy.

Time will not be consumed in citing cases which proclaim the principle that the authority of administrative agencies is confined to the boundaries specified in the implementing statute. Nor will space be used to quote from cases which declaim against administrative legis-

lation. The colored thread of this point is that neither statutory nor social justification may be found for administrative or judicial enlargement of the Board's power to the point that it may impose labor protective conditions on the approval of voluntary contractual transactions among air carriers.

Had Congress thought that the airline industry had reached a comparable status with the railroads of full development brinking on insipient deterioration it is quite certain that the Civil Aeronautics Act would have been amended long before this to add a section similar to Section 5(2)(f) of the Transportation Act which was added to the books in 1940 and which formed the encouragement that the United States Supreme Court needed to bolster the *Lowden* decision. Since Congress has chosen to remain silent on the matter it is not right that the Board should be allowed to enlarge its own authority.

This short treatment of a matter of compelling importance to Western and to the airline industry is not to be construed as a lack of faith in the argument or as an intimatiton that it is not deserving of high judicial treatment. So long as the other points argued give a firm basis for a reversal it is thought that this point would be deemed moot and that a decision on it might better be reserved for another case, should the Board continue to insist upon its right to legislate administratively.

Conclusion.

Unless the Board's order of July 7, 1950, as supplemented by the order of December 29, 1950, be reversed in so far as it imposes labor protective conditions on the prior unconditional approval, an injustice will be visited on Western and a bad, dangerous and ill conceived administrative procedure will be established by judicial precedence.

The challenged orders of the Board should be reversed in accordance with the relief requested in Western's petition for review.

August 27, 1951.

Respectfully submitted,

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APPENDIX.

Pertinent Paragraphs of Sections 401, 408 and 412 of the Civil Aeronautics Act, as Amended.

Certificate Required.

Sec. 401 (49 U. S. Code 481). (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: Provided, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

Application for Certificate.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice of Application.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition

to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

Issuance of Certificate.

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity. If it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

* * * * * * *

Authority to Modify, Suspend, or Revoke.

(h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision

of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

Transfer of Certificate.

(i) No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest.

* * * * * * *

Acts Prohibited.

Sec. 408 (49 U. S. Code 488). (a) It shall be unlawful, unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged

in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

Power of Board.

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to

have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: Provided, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: Provided, further, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.

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Filing of Agreements Required.

Section 412 (49 U. S. Code 492) (a) Every air carrier shall file with the Board a true copy, or if oral, a true

and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise), affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

Approval by Board.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancelation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it. (As amended by Public Law 558, 77th Congress, approved May 16, 1942; 56 Stat. 301.)

Certificate of Service.

I certify that I am an associate of the firm of Guthrie, Darling & Shattuck, attorneys for Western Air Lines, Inc., and that on this date I will have caused to be served the foregoing brief upon all attorneys of record and upon the attorneys for United Air Lines, Inc., the Air Line Pilots Association and the Air Line Mechanics Division by mailing three copies to each, properly addressed with postage prepaid.

Los Angeles, California, August 27, 1951.

George G. Gute.